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No. 559.

In the

Supreme Court of the United States

October Term, 1932.

CITY OF HARRISONVILLE, MISSOURI, *Petitioner*,

vs.

W. S. DICKEY CLAY MANUFACTURING COMPANY,
Respondent.

CERTIORARI.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF RESPONDENT.

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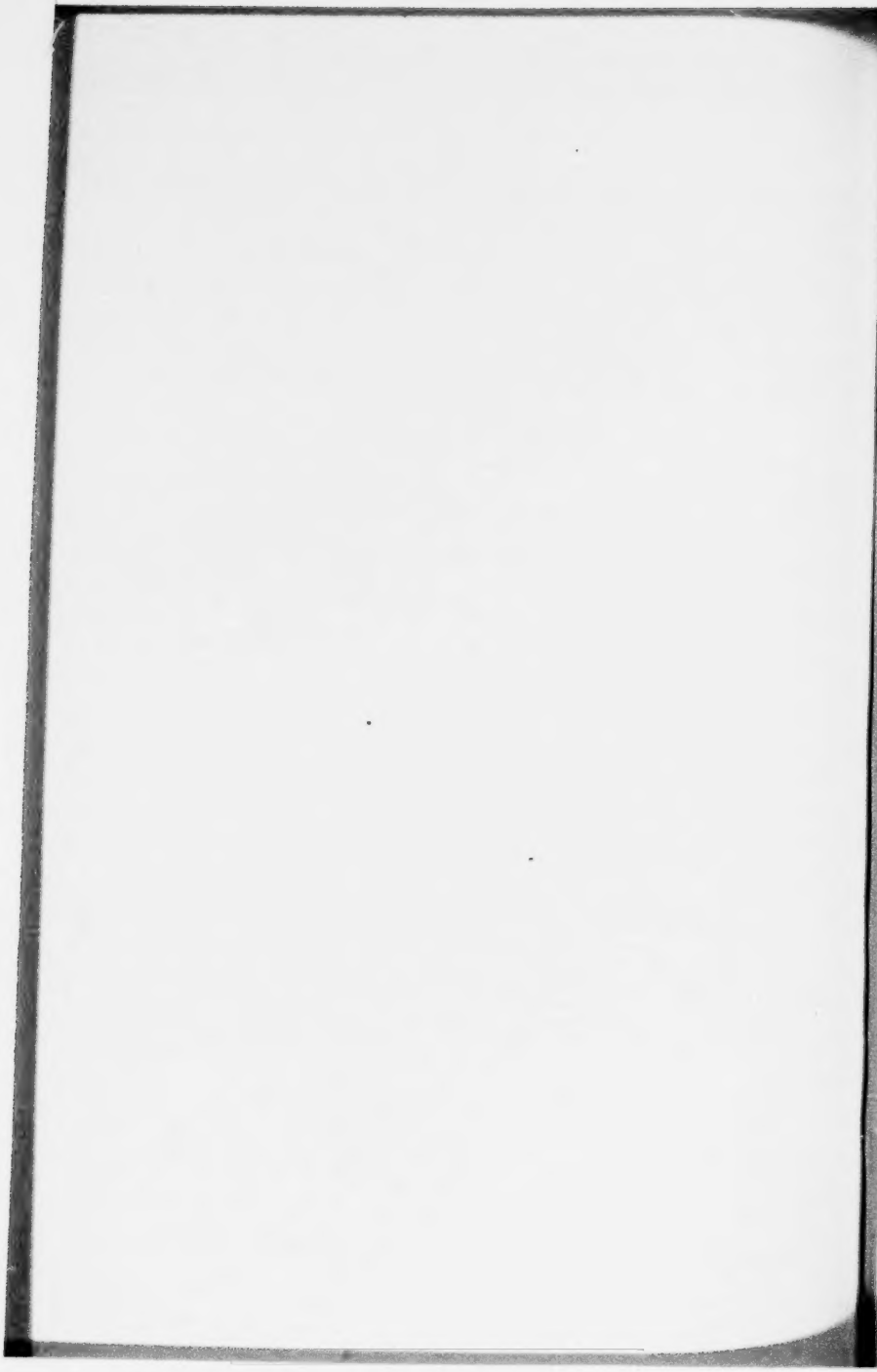

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CERTIORARI.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF RESPONDENT.

Respondent's Additional Statement of the Case.

Respondent makes reference to the statement of the case contained in respondent's brief opposing petition for writ of certiorari, and does not here repeat the statement therein contained. It is admitted by petitioner that a nuisance exists in the watercourse on respondent's land. The record indicates the extent of this nuisance, and contains the admission of respondent's engineer that a possible 40,000 gallons per day of raw, putrescible

sewage matter may flow into Town Creek (R. 87). A finding as to the existence of the nuisance and its character is contained in the decree of the trial court; also that the nuisance is unnecessary and may be abated by reasonable means available to the city (R. 15).

It appears from the record that the nuisance may be due in part to defective operation of the existing sewage disposal plant, also to type of design which permits the entire sewage of the City to be passed around the existing disposal plant and discharged into the watercourse (R. 51). Petitioner admits that as to defective operation of the existing plant petitioner should not be heard to complain of the decree.

Petitioner's statement of the normal operation of an Imhoff tank should be supplemented by a statement concerning complete sewage reduction. The following is a paraphrase of the expert testimony on the point (R. 49-52).

The purification of sewage is simply a process of oxidation. The organic matter in sewage consumes oxygen. When the demand for oxygen existing in such organic matter has been satisfied, the sewage is purified, i. e., it is no longer putrescent. The Imhoff tank settles out solids, leaving suspended in the liquid which flows out of the tank forty to forty-five per cent of the organic matter—more if the Imhoff tank is inefficiently built or operated. Petitioner makes the statement in its supplemental and reply brief that the contents of the digestion chamber of the Imhoff tank constitute the most noxious part of the sewage. This is not the case. The organic matter in suspension in the liquid part of the sewage which passes directly through the Imhoff tank is just as putrescent, odorous and noxious as the solid matter

which settles in the tank. The organic matter which passes through the Imhoff tank must be further exposed to oxidation by some process. It may be confined in sand filters or confined in beds in which, by mechanical agitation, the process of oxidation will be accelerated or, if a body of running water is large enough, the oxidation will occur there by the reason of the presence of dissolved oxygen in water. In the case at bar the stream would have to be forty to fifty times larger than it is to supply the oxygen necessary to purify the quantity of sewage in question. Effective sewage disposal simply means complete oxidation. When that has been accomplished by any of the several available processes, then the liquid residue is harmless and inoffensive.

We proceed to a discussion of the issues which petitioner says are of sufficient importance to warrant the attention of this court. We discuss those issues in the order contained in petitioner's supplemental and reply brief.

Summary of the Argument.

I.

The sewage plant in question discharges raw, untreated sewage into the watercourse on respondent's land, and creates a condition of gross pollution, also contaminates with foul odors and noxious gases the air on respondent's premises and about the dwelling house thereon. Respondent's land is improved with barns, silos and other structures costing twenty-five or thirty thousand dollars, and is maintained as a farm for registered Hereford cattle of the value of $20,000.00 or more. The watercourse and one hundred acres or more of pasture land through which it runs is the heart of this farm,

which consists, however, of a considerably larger tract of land than the one hundred acres affected by the contaminated water supply. Petitioner admits the existence of the nuisance, and admits that the sewage disposal plant maintained by petitioner is incapable of reducing the sewage sufficiently to eliminate the nuisance. Petitioner also admits that improvements and additions to the plant could be made which would eliminate the nuisance, but contends that since the nuisance is caused by a physical structure enduring in its nature, the respondent has no cause of action except for damages.

Respondent contends, and the courts below found, that the City is unreasonably maintaining an unnecessary nuisance; that the existing plant can be easily improved, and that the improvements required to eliminate the nuisance will be such as are in general use in other municipalities in the State of Missouri of about the same size as the petitioner—some smaller. Respondent contends that damages at law would not constitute an adequate remedy, and that the City has no right to persist in the maintenance of a sewage system which was negligently constructed in the first instance, and is being negligently maintained. The courts below enjoined the City from discharging putrescible sewage matter into the watercourse, and allowed a reasonable time—six months—in which to abate the nuisance.

II.

Petitioner contends that the injunction is improper because the City has no financial resources with which to improve its sewage disposal plant. Respondent contends that if this were true it would not constitute a defense. If the City cannot maintain an adequate dis-

posal plant, meeting reasonable standards in general use by other municipalities, then it has no right to gather its sewage in mains and project it into the watercourse, thus leaving the entire burden upon respondent. However, respondent does not accept petitioner's position that the City is without financial powers, and shows that City has the following powers:

1. To issue bonds for at least one-half the cost of one method of improving the existing plant.

2. To levy a special public sewer tax under Missouri statutes to pay for the cost of such an improvement.

3. To levy special benefit assessments upon the land in joint sewer districts to pay the cost of such an improvement.

4. To contract for the construction, lease or use of adequate sewage disposal facilities, and pay under such contract over a period of ten years; that the total contract price will not be an indebtedness within constitutional limitations, and that a general tax sufficient to meet such contract payments will not fall within constitutional limitations for general taxation purposes.

III.

Furthermore the respondent contends that limitations upon the financial powers of the City are not applicable to indebtedness or expenditures involved by reason of a judgment, judicial decree, or other compulsion. Such limitations are applicable only to the voluntary acts of the City.

IV.

Petitioner asks this court to reverse the decisions below upon the ground that the inconvenience to the City will be great as compared with the injury to the respond-

ent. The doctrine of balancing such considerations does not obtain in Missouri. Furthermore, the matter is one of judicial discretion which this court will not ordinarily review on certiorari.

V.

The petitioner contends that the injunction encroaches upon the legislative function. To make the point petitioner assumes that the decree orders the City to perform positive acts. The decree merely enjoins discharge of putrescible sewage matter upon respondent's land. Furthermore, construction and maintenance of sewers is a corporate and not a governmental function.

ARGUMENT.

I.

The Question of Permanent or Temporary Nuisance—The Real Question Concerns Injunction of a Nuisance Created by an Inadequate and Insufficient Municipal Sewage Disposal Plant.

Petitioner urges this court to pass upon the question of what constitutes a temporary as distinguished from a permanent nuisance, asserting that that is a question of sufficient importance to warrant the attention of the Supreme Court of the United States. Petitioner in the case at bar wishes to establish that the admitted nuisance is permanent, not because the legal conception involved in a permanent nuisance renders the nuisance any less obnoxious, but rather because, according to petitioner, a permanent nuisance cannot be abated by an injunction in equity. The effect of applying petitioner's position to the facts in the case at bar would be to sanction permanently the City's act in constructing an inadequate sew-

age system, and the consequent burden imposed thereby upon respondent's land.

Petitioner's statement that respondent has an adequate remedy at law for damages is insufficient. True, respondent might have originally brought an action for damages. The remedy, however, would not have been adequate. The law throws every possible protection around an owner of land. For example, a contract to buy real estate is specifically enforceable. The purchaser is not left to a remedy at law for damages. One reason, among others, is that no two pieces of land are alike. No landowner can be adequately compensated in money for the loss of a particular parcel of land. Pomeroy, Specific Enforcement of Contracts (3rd Ed.), Sec. 9.

The record in this case discloses, and the trial court found that the tract of land in question is part of a farm used for pasturage purposes; that the farm has been improved by the construction of barns, silos and other equipment at an expense of twenty-five to thirty thousand dollars; that the land is used for pasturage of a herd of Hereford cattle; that many of these cattle are registered, and that the herd has a value of approximately twenty thousand dollars; that the contaminated watercourse is the only effective water supply for the entire farm (R. 177). It is impossible to compensate an owner in money for the injury done to a stock farm of such a character developed over a period of many years.

Furthermore, the statute of limitations has probably run against a cause of action for damages. Actions for trespass upon real estate are barred in five years in Missouri. Revised Statutes of Missouri 1929, Sec. 862 (see Appendix A). This period applies to actions at law to recover for stream pollution. *Kent* v. *City of Trenton*, 48 S. W. (2d) 571 (Mo. App., 1931) (not

yet officially reported). Petitioner in its effort to defeat the existing action urges that respondent has an action at law for damages, but we are safe in saying that limitations will be pleaded if that action should ever arise. Respondent confidently brought this action in equity, relying upon its right to enjoin an unnecessary nuisance. If this action be now defeated, respondent probably will be left with no remedy at all.

We repeat that the first object involved in petitioner's effort to secure from this court a decision that the Harrisonville disposal plant constitutes a permanent nuisance is to compel the respondent land owners to submit permanently to the results of the nuisance and relieve the City of whatever may be involved in the way of work and labor, and the expenditure of money to abate the nuisance. That such abatement is possible is admitted.

The second result of petitioner's position would be far-reaching. If the method of sewage disposal in the case at bar constitutes a nuisance which the courts cannot enjoin, then any less adequate method of disposal would also be beyond the power of injunction. In other words, despite the fact that standard methods for sewage disposal are wholly effective, so that complete reduction of the sewage may be accomplished, yet any city could disregard such methods, and project its sewage wholly untreated into any watercourse, leaving the landowner to bear all of the consequences; that is the result that petitioner asks this court to create by holding that the nuisance which petitioner is now maintaining may not be enjoined in equity.

We believe that the controlling principles in this field are already established by this court. The important question is not as to what constitutes a permanent nuisance, and what constitutes a temporary nuisance. The im-

portant question is: may the City exercise its function of sewage disposal in such manner as to create an unnecessary nuisance.

Petitioner's argument seeks to make magic words out of the phrases: permanent nuisance and temporary nuisance. If the nuisance is permanent, says the petitioner, injunction will not lie; if temporary, injunction will lie. These words should not be the basis for the decision. The question is: May a municipality build any kind of sewage disposal device, however crude or inadequate, discharge the effluent into the watercourse of an adjoining land owner, pay him damages for the diminished value of the land caused by the pollution and odors, and then go its way in peace; or must a city in disposing of its sewage have regard for standard methods of sewage disposal in general use by other cities of like size —methods which eliminate any need for pollution in the adjoining landowner's water course? In other words, may the city be as negligent as it pleases in constructing its sewage disposal plant or must it use reasonable standards of care? Upon this question the controlling factor is not whether the nuisance be permanent. Let us illustrate with the facts in the case at bar. Suppose the respondent had brought a suit for damages against the city and had recovered for diminished value of the land and for the discomfort, inconvenience and other injuries caused by the pollution, noxious odors, fumes and gases. Then suppose respondent had brought a second action for damages. Now if the nuisance were permanent, i. e., if all the damage which could occur were inherent in the original situation then the first action would be a bar to the second action. If, however, the nuisance were temporary, i. e., if all possible damage were not inherent in the original situation, then the first action would not

be a bar to the second. In reaching the first result, the courts speak of the nuisance as permanent, in reaching the second result they speak of the nuisance as temporary. Furthermore, limitations are always involved. If all possible damage were inherent in the original situation, limitations run from the date the offending cause began to operate; if not, then limitations do not apply.

Therefore, the words permanent and temporary are words which describe a legal result. If a first action for damages operates as a bar to a second action for damages for the reason that a plaintiff has had a full and complete recovery in the first action, then the nuisance is called permanent. If the first action does not operate as a bar to a second action for damages for the reason that a plaintiff did not have a full and complete recovery in the first action, then the nuisance is called temporary. Again, if all possible damage were inherent at the moment the offending cause began to operate then a right to damages will be barred by limitations unless asserted within the statutory period; in such cases the nuisance is called permanent. If, on the other hand, all possible damages were not inherent at the moment the offending cause began to operate then a right to damages will not be barred by limitations; in other words, limitations will not run from that initial moment. In such cases the nuisance is called temporary.

The correctness of this analysis will be disclosed by a consideration of petitioner's cases in which it will appear that in no case has an injunction against the negligent maintenance of a cause of nuisance been denied for the reason that the nuisance was permanent rather than temporary.

It may be considered that if the respondent in this case had brought an action for damages and had recovered for

diminished value of the land and other injuries, then if all possible damage were inherent at the moment the City's sewage plant began to operate that action would have been a bar to a second action for damages, and possibly to a later action for injunction; but, because respondent *could* have brought such an action does not mean that respondent was confined to that action and no other. Respondent's position is that no action for damages or series of actions for damages provide an adequate remedy; that the City is negligently maintaining a nuisance which proceeds from unnecessary causes; that the City is not complying with standards of care, reasonable and usual in the matter of sewage disposal; that therefore injunction will lie against such conduct.

Now let us examine the four cases upon which petitioner relies.

In *Kent* v. *City of Trenton*, 48 S. W. (2d) 571 (Mo. App. 1931; not yet officially reported—petition herein, page 25), no question was raised as to negligent construction or maintenance of the sewage structure. The action was for damages; the structure was completed and in operation in 1914; the action was brought in 1926. It was held that the action was barred by the five-year statute of limitations. It appeared also that the City had acquired from a prior owner an easement for the sewage outfall in consideration of the agreement of the City to waive taxes upon the property in question. It appeared also that the cause of the injury was an increased flow of sewage caused by the construction of a new sewage district, but that plaintiff had failed to allege this cause of action in the petition, and had set it up in a reply, which, under the Missouri law, may contain rebuttal matter only and will not be taken to aid the petition in stating a cause of action.

The case does not deal in any respect with negligent maintenance of a sewage disposal plant and is disposed of upon grounds entirely unconnected with that question. The Eighth Circuit Court of Appeals considered the case, and noted the fact that the decision rests upon points not involved in the case at bar. That court said:

> "Upon any one of two or more grounds specified in the opinion that case was rightly decided." (R. 193.)

In *Hayes* v. *Railroad*, 177 Mo. App. 201, 162 S. W. 266 (1914) (petition herein, p. 26), petitioner overlooks the significance of the result. In that case a railroad embankment was constructed without sufficient openings to allow passage of water in times of high water. A Missouri statute required such openings in all such embankments. Suit was brought for damages from overflow which occurred more than five years after the embankment was built. The court held that the action was not barred by the five-year statute of limitations. The court held the nuisance temporary because the embankment without the openings, was not a legal structure.

The court said:

> "This Act is a legislative declaration that railroad embankments are not to be regarded as permanent structures or nuisances to the extent of not requiring adequate openings to be made to afford sufficient drainage. An embankment without such opening is, since said legislative enactment, however it may have been before, an abatable nuisance to the extent of remedying the defects, and the damages caused thereby are to be sued for and recovered by successive actions as and when they occur within the statutory period of limitation after the same actually accrues. * * * In the case of *Charles* v. *Railroad*, 124 Mo. App. 293, 301, 101 S. W. 680, the court held that

> because of a decree of court in a condemnation proceeding providing for an opening through a railroad embankment which the railroad had failed to make, the court would not regard the same as a permanent structure, all damages arising from which must be sued for in one action, as the railroad probably would, and if not, could be made to construct the opening. The decree in that case was not more effectual in that respect than is the statute in this case."

The case is contrary to petitioner's contention that the nuisance is permanent because the structure is enduring. In the case at bar the structure, though enduring, is inadequate—so inadequate as to make its maintenance negligent. That this inadequacy is established by court decree rather than by statute is immaterial, as the court pointed out in the passage just quoted. The court in the Hays case quoted with approval the following passage from *Pinney* v. *Berry*, 61 Mo. 359 (1875):

> "But it is obvious that this rule (recovering the whole damage in one action) has no application to such nuisances as may be removed the day after the verdict, or for the continuance of which a second or third may be maintained, or which may be abated at the instance of the injured party, by the order of a competent court."

The trial court in the case at bar found, as a fact, such inadequacy. The appellate court confirmed the finding. This court will not disturb that finding upon a review on certiorari. *United States* v. *Johnston*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925); *Page* v. *National Gas Corporation*, 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096 (1932).

In *Smith* v. *Sedalia*, 244 Mo. 107, 149 S. W. 597 (1912) (petition herein, p. 27), a suit was brought for damages and injunction against the City of Sedalia for discharge of the effluent from its sewer plant onto plaintiff's land. A prior suit had been instituted for damages on account of the same facts (*Smith* v. *Sedalia*, 152 Mo. 283, 53 S. W. 907 (1899). This prior suit was still pending. The real holding of the case is that the prior suit constituted a bar to the second suit. No question was raised in either case as to the adequacy of the sewage disposal plant or as to the negligent manner of its construction or operation. The litigation occurred 20 years ago, at which time methods of effective sewage disposal were not in as general use as they are today.

The court in the second case held that the plaintiff had elected, in his first suit, to confirm the right of the city to the use of plaintiff's land by bringing an action broad enough to cover damages for the diminished value of the land. The court held that a recovery of damages for the appropriation of the stream had the effect of confirming the right of the city to sewer into the stream as effectively as if that right had been obtained through condemnation. The first suit was an election by the plaintiff to adopt that form of relief. The court said:

> "Both suits brought by plaintiff are, substantially, actions for damages for injury to his land resulting from a wrongful appropriation by the defendant city. He concedes the right of the city to condemn, and complains because it has not done so, insisting in effect that the city shall put him in the position to claim permanent damages; but by his 1895 suit he has put himself in position to claim the same measure of damage in full compensation for the injury.
>
> II. Holding as we do that the injury is permanent, and that damages in full compensation can be

> awarded in the suit pending in Johnson County, such damages to be measured by the decrease in market value of the land caused by the sewer, it is obvious that plaintiff cannot have such compensation and also maintain a suit for injunction. A recovery of damages as indicated would have the effect of confirming the right of the city to sewer into the stream as effectually as if the right had been obtained through condemnation (*Doyle* v. *Railroad,* 113 Mo. 280)."

The decision is correct. Obviously a property owner could not institute an action for the entire damage suffered, including diminished value of the land, and then afterwards seek an injunction. The case so holds; but it does not hold that a property owner who elects in the first instance to seek an injunction against a nuisance, can not have that remedy. Petitioner misconstrues the effect of the decisions allowing recovery in one action for all damages. Petitioner apparently believes that because such a recovery may be had at law, that is the only remedy available. None of the cases cited by petitioner establish such a principle.

Likewise in *Horine* v. *Peoples Sewer Company,* 200 Mo. App. 233, 204 S. W. 735 (1918) (petition herein, p. 29), no issue was raised as to the adequacy of the sewage disposal facilities or as to the management, construction or maintenance thereof. Plaintiff simply sued to enjoin the discharge of the sewage without any showing as to whether the plant maintained by the city was as effective as possible, and it does not appear whether the city had done all that could be done to minimize the nuisance. Furthermore, it appears in the case that the city had acquired a prescriptive right over a long period of years, and that as in the case of *Smith* v. *Sedalia, supra,* a prior

action at law for damages was pending. The court said that it would not enjoin the further operation of the sewage plant "when it clearly appears that any injury caused to plaintiff by the sewer can be fully compensated by a *pending* action at law." (Italics ours.)

Thus, upon examination, it appears that the four cases relied upon by petitioner to defeat respondent's action for injunction do not establish the proposition that under no circumstances will the Missouri courts enjoin the maintenance of a municipal sewage plant. In none of those cases was the question of negligent construction or negligent operation of a sewage plant involved. Those cases hold that a property owner may have one action for damages in which all damages past or future may be recovered at law, but they do not hold that upon a showing of insufficient or negligent construction or operation injunction will not lie. Upon that point the cases cited in respondent's brief opposing petition for writ of certiorari are clear (pp. 5-11). In addition to those authorities, respondent invites attention to the following cases:

In *Missouri* v. *Illinois and the Sanitary District of Chicago*, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 493 (1901), there was an original proceeding in this court to enjoin the discharge of the sewage from the city of Chicago through an artificial canal into the Mississippi River. The decision of this court was rendered upon a demurrer to plaintiff's petition. This court said of the petition:

> "The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring state and its inhabitants."

The demurrer to the bill was overruled, and the defendants given leave to file answers. Thus it is plain that this court held that there is an inherent jurisdiction in equity to pass upon the reasonableness of methods adopted by a municipality to dispose of its sewage. In the *Illinois* case, *supra,* this court cited with approval the decision in *Chapman* v. *City of Rochester,* 110 New York 273, 18 N. E. 88 (1888).

In the *Chapman* case plaintiff, living in the suburbs of defendant city, collected the waters of a stream which arose in the city and flowed across his property, in an artificial basin for domestic uses. The city constructed sewers, discharging surface water and sewage into the stream above plaintiff, rendering its water unfit for use, etc. In an action for damages and injunction against continuance of the nuisance, plaintiff recovered $1200.00 present damages and the injunction prayed, and judgment was affirmed, the court saying:

> "These and other facts well warranted the conclusion of the trial court that the act of the defendant, in thus emptying its sewers, constituted an offensive and dangerous nuisance. Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause; and we find no reason to doubt that he is entitled, not only to compensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of. *Goldsmid* v. *Commissioners,* L. R. 1 Eq. 161, L. R. 1 Ch. 349. In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant, against the judgment appealed from, are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared

> by the city, and for which it is responsible. * * * In fine, the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which in its natural condition he is entitled, an action against the party, whether it be a natural person or a corporation who causes that pollution."

The above language is quoted in part with approval by the Supreme Court of the United States in *Missouri* v. *Illinois, supra.*

Missouri v. *Illinois* is cited by the Supreme Court of Michigan in *Attorney General ex rel.* v. *City of Grand Rapids,* 175 Michigan 503, 141 N. W. 890 (1913). In that case an injunction was sustained against the city to prevent the emptying of the city's sewage into a stream so as to constitute a nuisance to riparian owners lower down the stream. The court expressly repudiated the doctrine that the necessity of the city excused the nuisance, saying:

> "The doctrine that necessity is no defense to an unreasonable pollution of a watercourse is supported by the following cases: *Straight* v. *Hover,* 79 Ohio St. 263, 22 L. R. A. (N. S.) 276, 87 N. E. 174; *Hunter* v. *Taylor Coal Co.,* 16 Ky. L. Rep. 190; *Beach* v. *Sterling Iron & Zinc Co.,* 54 N. J. Eq. 65, 33 Atl. 286; *H. B. Bowling Coal Co.* v. *Ruffner,* 117 Tenn. 180, 9 L. R. A. (N. S.) 923, 100 S. W. 116, 10 Ann. Cas. 581; *Day* v. *Louisville Coal & Coke Co.,* 60 W. Va. 27, 10 L. R. A. (N. S.) 167, 53 S. E. 776."

In *Baltimore and Potomac R. R. Co.* v. *Fifth Baptist Church,* 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784 (1891), the case of a nuisance caused by the proximity of the railroad company's shops to the church property

came before this court for a second time. The first case under the same title is reported in 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883) (respondent's brief opposing petition for writ of certiorari, p. 9). The second case adds nothing to the principle outlined in the first case, viz., that the power of eminent domain may not be exercised unreasonably. The case is significant, however, in showing that although the offending structure in that case was enduring (an engine house and repair shop), yet this court did not treat the nuisance as permanent in the sense that the first recovery of damages was a final recovery. This court permitted recovery in two subsequent actions, both involved in the second case, and it expressly held that the damages awarded in the second case should not be minimized by the amount of the initial recovery. That this court regarded the engine house in that case as a continuing or temporary nuisance in the sense that repeated recoveries could be had is clear from the following quotation:

> "The cases at bar afford a good illustration of the rule of law, and of its application, as stated by Blackstone: 'Indeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.' 3 Bl. Com. 220."

In *Bollinger et al. v. American Asphalt Roof Corporation*, 224 Mo. App. 98, 19 S. W. (2d) 544 (1929), plaintiffs maintained a home, and boating business, on the Blue River near Kansas City, Mo. Defendant operated a factory near by and discharged into the stream oil and noxious fluids and odorous compounds and caused soot, smoke, fumes and odors to be discharged into the

air, thus rendering the stream unfit for plaintiff's business and so contaminating the air as to render plaintiff's home and place of business untenable and useless. The factory had been built and put in operation by October 1, 1920. The suit was commenced September 30, 1926. Defendant contended that the injury was permanent and had continued for more than five years and hence that plaintiff's suit for damages was barred by limitations. The court held that the nuisance was not permanent because "abatable." The court said on this point:

> "By their very nature the things involved in the manner of use of the plant are abatable, and the evidence shows that some of them in this case were, in fact, abated in part, for example, by the erection of a 60-foot condenser stack in 1923, for the disposition of fumes and smoke * * *."

So in the case at bar all that is required is the addition of certain features to the existing sewage plant to abate the nuisance (R. 51).

A nuisance is not permanent because the source is a tangible structure rather than an intangible act, method or use. A nuisance is permanent only when the cause, whether a physical structure or not, is unchangeable or unabatable.

In *Blankenship* v. *Kansas Explorations*, 325 Mo. 998, 30 S. W. (2) 471 (1930), plaintiff brought action against defendant for the diminished value of plaintiff's mill caused by the dumping of sludge and debris from defendant's mine into plaintiff's mill pond. The Missouri Supreme Court treated the nuisance created by the accumulation of sludge and debris in the mill pond as permanent, and allowed recovery of damages for the diminished value of plaintiff's property, or the cost of

removing the debris from the mill pond, whichever sum might be less. The following passage contains a good survey of the Missouri authorities.

> "It (the deposit in the mill pond) is not a structure upon defendant's land or a process of operation going on upon defendant's land, but a deposit upon plaintiffs' land, which plaintiffs cannot by judicial process compel defendant to remove.
>
> *In Hanlin* v. *Meat Co., supra,* the defendant, operating a meat packing plant, emptied into a stream running over plaintiff's land offensive substances and fluids, which polluted the stream, and destroyed a well adjacent thereto. It was held that pollution of the stream could be abated by the defendant, and was of a temporary nature, but also held that the injury to the well was permanent because it had been destroyed.
>
> In *Kelly* v. *City of Cape Girardeau, supra,* the plaintiff's complaint was the overflow of his property by surface water from a sewer. He was permitted to bring successive actions. The ground upon which the injury was held temporary was, that the cause of it was not permanent in a legal sense, but could be abated by the city, by the enlargement of drainage pipes or diversion of the water.
>
> *Ivie* v. *McMunigal* was a case where the complaint was of damage from smoke, cinders and dirt falling upon plaintiff's dwelling house from defendant's foundry. Permanent damages were held to be not recoverable on the ground that it was a nuisance such as could be removed the day after verdict, or could be abated by the order of a competent court, or, if continued, a second or third action for damages was maintainable.
>
> In *Schoen* v. *Kansas City,* the injury complained of, pollution of the water of a stream by emptying a sewer therein, was the result of a temporary delay

in the construction of a sewer. The ruling proceeded upon the theory that the cessation of the work was not permanent, and that when the work should be continued the nuisance would cease.

In *Pinney* v. *Berry*, the plaintiff complained of the erection and maintenance of a dam across a creek which caused the water to flow up a branch on plaintiff's land, cutting off communication with a part of his land, filling the branch with mud, leaves, etc., and creating a nuisance which injured the health of his family. The plaintiff was permitted to prove that his property was rendered less valuable per acre and that a spring was destroyed, and the value of the spring. The petition contained no allegation as to the destruction of a spring, and objection to the evidence was made upon that ground. No instructions were asked or given by either party. It was ruled that the trial court erred in allowing the plaintiff to prove the value of his land before and after the creation of the nuisance. After stating what was said to be the rule of damages for negligent injury to real property the court said: 'But it is obvious that this rule has no application to such nuisances as may be removed the day after the verdict, or for the continuance of which a second or third action may be maintained, or which may be abated at the instance of the injured party by the order of a competent court.'"

Citations of the cases digested in the foregoing passage are:

Hanlin v. *Meat Co.*, 174 Mo. App. 462, 160 S. W. 547 (1913).
Kelly v. *City of Cape Girardeau*, 284 S. W. 521 (1926) (not officially reported).
Ivie v. *McMunigal*, 66 Mo. App. 437 (1896).
Schoen v. *Kansas City*, 65 Mo. App. 134 (1896).
Pinney v. *Berry*, 61 Mo. 359 (1875).

Thus the distinction between a permanent nuisance and a temporary nuisance turns upon whether or not the abatement can be effected by acts to be done by defendant, under judicial compulsion, if necessary, at the source of the nuisance. In the Blankenship case, *supra*, the court probably could not order by mandatory injunction that the defendant go upon plaintiff's land and remove the sludge and debris from the mill pond. On the other hand, in the Kelly case and the Pinney case, *supra*, as in the case at bar, the defendant can "the day after verdict" abate the nuisance by immediate action lying within the power of the defendant. The nuisance in the case at bar could be removed almost immediately by cessation of the outflow from the sewer plant into the watercourse. Therefore, it is a temporary nuisance. The nuisance in the Blankenship case, consisting of a permanent deposit in the mill pond on plaintiff's land, could not be immediately abated. In the case at bar an injunction against the city will for all practical purposes terminate the nuisance. In the Blankenship case an injunction against further discharge of slag and debris from the mine would not have cured the permanent solid deposits of such matter that had already accumulated in plaintiff's mill pond; therefore the nuisance was permanent.

In *Kelly* v. *City of Cape Girardeau, supra*, a second action for damages caused by overflow from the city's storm sewer was instituted. The plaintiff had recovered damages in a prior action and after that recovery an improvement had been made in the drainage system. In the second action plaintiff claimed further damages from overflow despite the improvement. The court held the nuisance temporary, and permitted the maintenance of the second action. The court said:

"It appears that the cause of the overflow is not permanent in a legal sense. It could be abated by the enlargement of the discharge pipes or the diversion of the water, and when this is true the wrong will be treated as temporary in character. *Carson* v. *City of Springfield*, 53 Mo. App. 289; *Foncannon* v. *City of Kirksville*, 88 Mo. App. 279; *Schoen* v. *Kansas City*, 65 Mo. App. 134; *Scott* v. *City of Nevada*, 56 Mo. App. 189; *Lewis* v. *City of Springfield*, 142 Mo. App. 84, 125 S. W. 824; *Howard County* v. *Railway*, 130 Mo. 652, 32 S. W. 651; *White* v. *City of Springfield*, 189 Mo. App. 228, 173 S. W. 1090.

The first suit was filed within 5 years from the date of the completion of the work of the street which is charged to have caused this condition, and the present suit was filed within 5 years of the date of the first suit. If the conditions existing were illegal and abatable—that is to say, if the nuisance is subject to abatement by order of a competent court—then the plaintiff has a right to successive actions from damage resulting therefrom."

It is apparent that the nuisance in the case at bar is temporary. The real question is whether the plaintiff must be left to a series of actions at law or may have injunctive relief. The record shows, and the courts have found, that the city has not employed reasonable and usual means to reduce its sewage. Under such circumstances there is no doubt of the power of a court of equity to enjoin the nuisance.

In *Fisher* v. *American Reduction Co.*, 189 Pa. 419, 42 Atlantic 36 (1899), the plaintiff sought to enjoin the operation of a reduction plant. The plant was constructed and operated under contract with the city of Pittsburgh. The plant was located in the most unobjectionable place that could be found within the city limits.

and operated efficiently as possible with the type of equipment available. It appeared, however, that noxious odors could be reduced by additional equipment which would make for a speedier reduction of the sewage. The court entered a mandatory injunction ordering the defendant to dispose of the garbage as fast as it was brought to the spot, and take other practical steps which would render the operation of the plant less objectionable.

In *Munk* v. *Columbus Sanitary Works,* 7 Ohio N. P. 542, 5 Ohio D. E. C. 548 (1897), the court found that the defendant in the operation of a garbage plant was creating a nuisance, and a decree was entered restraining the defendant from so operating the plant as to cause the injuries complained of. The operation of the order was postponed until a fixed date in the future and the defendant was directed in the meantime to make such alterations in the plant that it could be operated without creating the nuisance, with the further provision that if the defendant did not at once, in good faith, take steps to prevent the nuisance, the injunction would become effective immediately.

In *Simpson* v. *Dupont Powder Co.,* 143 Ga. 467, 85 S. E. 344 (1915), a municipal corporation was proceeding under contract with a crematory company to erect an incinerator for the consumption of the garbage of the city. The erection of the crematory was in progress when a suit was filed in which it was established that the location of the incinerator at the point selected would create a nuisance injuring residents in the community by causing offensive odors, and the gathering of flies in the vicinity. It was shown that other locations were available for the incinerator in which injury would not be done to property owners. The completion of the crematory was enjoined.

In *Block* v. *Baltimore,* 149 Maryland 39, 129 Atlantic 887 (1925), suit was brought by adjoining land owners against the city and the owners of a garbage reduction plant. The plaintiffs in their bill alleged that nearby waters were so polluted as to be of no use for any purpose, and that surrounding territory was rendered almost uninhabitable by odors emitted from the plant. It was held that since the plaintiffs suffered special damage and there was no adequate remedy at law, they were entitled to the injunction.

In *State ex rel. Board of Health* v. *White,* 90 N. J. Eq. 621, 110 Atlantic 43 (1919), it appeared that the defendant had contracted with the city of Asbury Park to remove its garbage. He hauled the garbage to his sixty-acre farm some distance from the populous section, and there cooked or steamed the garbage and fed it to his pigs. Plaintiff complained of the nauseating odors. Injunction was granted.

In some of the cases injunction was granted against disposal of municipal sewage or garbage regardless of a showing as to whether the city was using every means reasonably available to avoid a nuisance. We do not seek to go that far in the case at bar. The whole burden of plaintiff's testimony at the trial was to show that there are effective means for the reduction of sewage which leave the effluent clear, colorless, odorless, and nonputrescent. The effluent from such a plant will not create a nuisance, even in a very small watercourse. The principle for which we contend and the one adopted by the courts below is that a city must exercise its function of sewage disposal in a reasonable manner and if it is creating an unnecessary nuisance by failure to adopt reasonable means for disposal, injunction will lie. Failure to apply this principle would leave with the city

the power of arbitrary and oppressive conduct toward land owners in the environs. For example, the city of Harrisonville in the case at bar might have constructed a plain tank of concrete consisting of four walls and a bottom. Sewage flowing into such a tank and out into the watercourse would undergo but slight reduction. The Imhoff Tank in question is merely a modification of such a structure so designed as to retard the flow of sewage for a period during which a process of settling occurs. The ease and efficiency with which sewage may be *completely* reduced makes such a structure an unreasonable method for the reduction of sewage. If the city had used available methods, methods which are in general use; methods which can still be applied without abandoning the partially effective structure now in existence, then there might be a question concerning the right of the plaintiff to enjoin the trespass. The city has not used reasonable means.

The principle for which we contend is not a limitation upon the power of eminent domain. Any power is subject to such limitations as are involved in its reasonable exercise. It is the function and the power of the courts to determine those limitations. This would be true in the case at bar if the city had exercised a power of eminent domain to condemn the watercourse in question. The fact is that the city did not proceed by condemnation (R., p. 7), although it could have done so under Section 7023, R. S. Mo. 1929, which is as follows:

> "The board of aldermen may make regulations and pass ordinances for the prevention of the introduction of contagious diseases in the city, and for the abatement of the same, and may make quarantine laws and enforce the same within five miles

> of the city. They may purchase or condemn and hold for the city, within or without the city limits, within five miles therefrom, all necessary lands for hospital purposes, waterworks, sewer carriage and outfall, and erect, establish and regulate hospitals, workhouses, poorhouses, and provide for the government and support of the same, and make regulations to secure the general health of the city, and to prevent and remove nuisances: *Provided, however*, that the condemnation of any property outside of the city limits shall be regulated in all respects as the condemnation of property for railroad purposes is regulated by law; *and provided further*, that the police jurisdiction of the city shall extend over such land and property to the same extent as over public cemeteries, as provided in this article."

Even if the city had exercised this power, it would have been subject to the limitation involved in reasonable and adequate methods of sewage reduction. The power of eminent domain is not the power to be arbitrary or negligent.

II.

The Financial Ability of the City to Comply with the Decree.

(A) Bonding Power.

Petitioner assumes that the cost of complying with the injunction against "discharge of putrescible sewage matter" into the watercourse will be $25,000.00 or $30,000.00. This assumption is based upon the estimated cost of certain types of complete sewage disposal given by respondent's engineer in the course of his description of usual methods of complete sewage disposal (R. 51, 52). Petitioner introduced no evidence at the trial

as to cost of complete sewage disposal. Indeed the petitioner at the trial was somewhat equivocal in tendering a plea of municipal poverty as an excuse for maintaining the nuisance. This colloquy occurred (R. 99, 100):

> "The Court: Let's get at the point here. Are you trying to show the City of Harrisonville is poor?
>
> Mr. Barnett: Yes, sir, not only poor, but that it may not, within the limits of the law, by the sale of additional bonds get the money to build this secondary plant. Our purpose in this testimony is to show the court what the financial condition is of the City. Of course, whether or not the City can or cannot create greater indebtedness after that is a question of law, regulated by the Constitution and the statutes, but this is to give the court the facts about our present financial condition.
>
> The Court: Now is it your statement that the City could encroach unreasonably upon the land of a property owner and then defend its conduct, justify it, upon the ground that it was not financially able to do a reasonable thing?
>
> Judge Glenn: No, Your Honor, it is not.
>
> The Court: In other words, that a poor town could do an unreasonable thing and a rich town could not.
>
> Judge Glenn: We do not take that position, but this: If it is possible for this court to make an order for us to put an additional plant in there, this court would have to take into consideration the fact that —whether we have exceeded our constitutional limit of indebtedness before the court could force us to do it; in other words, if the court could force us to do something the Constitution said we couldn't. But as to the damage we have done, the party can sue us and get a judgment and the court can cause a levy in addition to a constitutional limit, but the City can't vote a bonded indebtedness.
>
> The Court: I understand the theory that you can

pay damages, but you can't arrange to prevent damages, is that it?

Judge Glenn: This other way, we would have to vote bonds to do this, and we have exceeded our constitutional limit—that is, we haven't exceeded it, but we have already bonded the City to the maximum.

The Witness: Section 12 gives five per cent for the building of sewers. We have now under that five per cent some $42,500.00."

Thus the petitioner at the trial disavowed an intent to shield a wrong behind poverty, but urged that the City was incapacitated by an exhausted bonding power. It now appears by petitioner's admission that the City can raise at least half of the minimum estimated cost of one of the suggested methods of abating the nuisance by use of bonding power (petitioner's brief, p. 51).

Let us examine other methods available to the City.

(B) Special Public Sewer Tax.

One of the several methods of paying for the construction of a disposal plant is provided by Section 7031, Revised Statutes of Missouri 1929, which is as follows:

"The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and re-

> pairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

It is expressly held that this statute applies to a plant for the *disposal* of sewage as well as to lines and mains for the *collection* of sewage. *Schueler* v. *City of Kirkwood,* 191 Mo. App. 575, 177 S. W. 760 (1915).

The comprehensive nature of the statutory power will be noted; especially the power to levy the tax for *reconstruction* or *repair* of an existing general sewer system. The statute is clearly applicable to the case at bar.

Counsel for petitioner erroneously state that the foregoing statute has been held unconstitutional (petitioner's brief, p. 52). The case of *Union Trust Co.* v. *Pagenstecher,* 221 Mo. 121, 119 S. W. 1103 (1909), does not hold the statute unconstitutional; it holds that a tax of $2.50 per $100 levied in that case was invalid because not submitted to vote of the people under Sec. 11, Art. 10 of the Constitution of Missouri. The court holds the special public sewer tax to be a general municipal tax. Therefore the provision of the constitution above cited was applicable. Under that constitutional provision, no tax in excess of fifty cents on the hundred dollars valuation can be levied in a city of the class in question *unless* such excess be authorized by two-thirds of the qualified voters. In the Union Trust Co. case the matter of the tax had never been submitted to the voters at all. Hence, the tax, but not the statute, was invalid.

This point must be well noted, otherwise petitioner's erroneous statement that the statute is unconstitutional will be confusing.

The City of Harrisonville is at perfect liberty today to submit to the voters of the City of Harrisonville a proposition to reconstruct or repair the City's disposal plant, and two-thirds of the qualified voters may authorize the board of alderman to levy whatever tax may be submitted for that purpose.

The following quotation from the Union Trust Co. case, *supra,* gives the pertinent provisions of the Missouri Constitution and the holding of the court:

> "The section (Sec. 11, Art. 10, Mo. Const.) so far as applicable, reads: 'In cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; * * * provided, * * * for the purposes of erecting public buildings in * * * cities * * * the rates of taxes herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such * * * city * * * voting at such election, shall vote therefor.'"

The court then concluded that "before a legal tax in excess of fifty cents on the hundred dollars can be levied the question must receive the approval of two-thirds of the qualified voters who vote at an election held for that purpose." The court construes the phrase "public buildings" to mean "public works." See *Battle* v. *Willcox,* 128 S. C. 500, 122 S. E. 516 (1924).

Petitioner speaks as if the Missouri Constitution imposed an absolute limitation upon the City in the matter of raising funds. Such is not the case. The constitution simply prohibits a tax rate in towns of petitioner's class of more than fifty cents per hundred dollars of valuation

unless two-thirds of the voters approve for specified purposes.

The existing litigation is controlled, of course, by the city officials and their counsel. They have elected not to submit to the voters of the City a proposal to abate the unnecessary nuisance. Until they do that, the petitioner cannot urge in this court or any other court a matter of financial inability. The City officials should not assume that the voters wish to perpetuate the stench and pollution in the watercourse. They should assume that the voters would take seriously the trial court's statement that (R. 182):

> "The City in the exercise of its function should be anxious to avoid disposing of its sewage in such way as to occasion needless harm and injury to the people who hold property in its environs."

(C) Special Assessments.

Petitioner confuses this method with the special public sewer tax discussed in (B) just above.

Sec. 7038, Revised Statutes of Missouri 1929, is as follows:

> "Whenever the city shall deem it necessary, it may, by ordinance, provide for the construction of a septic tank or other sewage reduction device for the purpose of purifying the discharge from any district or joint district sewer. In such case the cost thereof shall be assessed against the lands in the district or joint district for which the same is provided in the same manner as is provided for the assessing of the cost of district sewers."

This statute provides a third method. A disposal plant may be constructed and paid for by special assessments levied upon a benefit district. The benefit district may

comprise several district sewers; indeed, all the district sewers in "the natural drainage area." (See Sec. 7037, R. S. Mo. 1929, Appendix B.) See also *Farmers & Merchants Trust Co.* v. *Hillcrest Realty Co.*, 285 Mo. 552, 234 S. W. 1023 (1920).

Counsel for petitioner stated in oral argument in the Eighth Circuit Court of Appeals that the sewer system of Harrisonville is a public sewer system. However that may be, the statute in question clearly gives the power to the City to lay out the City into districts or joint districts for the purpose of collecting the sewage into a disposal plant, and to levy benefit assessments against those districts or joint districts to pay for the improvement. The fact that the original sewer mains may have been laid as a public sewer system would not preclude dividing the city into districts for disposal purposes.

(D) General Revenue.

By authority of Sec. 7276, Revised Statutes of Missouri 1929 (quoted in petitioner's brief, p. 13), the City may acquire a sewage disposal plant and pay therefor out of general revenue over a ten-year period. Petitioner contends that the general revenue of the City is insufficient for that purpose. Petitioner states that the City's general revenue is only $6,000.00 per annum (petitioner's brief, p. 50). We find no support in the record for this statement. The record (pp. 102-107) contains statement of certain accounts, but a careful examination fails to disclose any showing as to amount of general revenue for any period whatever.

Petitioner argues that the general revenue must be first applied to paying the City's "general operating expense" (petitioner's brief, p. 51). There is, however, no showing in the record of the amount of fixed operat-

ing expenses of the City. Petitioner cites *Anderson* v. *Ripley County*, 181 Mo. 46, 80 S. W. 263 (1904) (petitioner's brief, p. 51). That case dealt with a statute prescribing the purposes for which the revenues of a *county* should be applied. Petitioner cites no authority controlling disposition of funds of the City in this case.

There is nothing in the record to show that the City may not manage its finances in such manner as to provide the funds for this method. Of course it is easy for the City officials to believe the task impossible because, evidently, they have no will for the job. On the other hand they did not hesitate recently to spend $100,000.00 for a water plant (R. 102, 108).

Furthermore, with respect to raising funds to make payments under the contract authorized by Section 7276, *supra,* the City is not limited to its constitutional power to levy taxes at the rate of 50c per hundred; neither would the total sum that might fall due within the period of that contract constitute an indebtedness within the meaning of Article 10, Section 12, of the Constitution of Missouri. *Lamar Water and Electric Light Company* v. *City of Lamar,* 128 Mo. 188, 26 S. W. 1025 (1894).

In that case a city of the fourth class entered into a contract with respect to a water works. The contract called for 20 annual payments of $3,000.00. For the purposes of meeting the annual payments, the City levied a tax "not exceeding 40c on the $100.00 valuation on all taxable property in the City, * * *." This tax of 40c per hundred dollars valuation was in addition to a general tax of 50c per hundred dollars of valuation. The case is a landmark in Missouri, and establishes two propositions:

1. That an annual tax authorized by Section 12, Ar-

ticle 10, of the Missouri Constitution (Appendix C) to retire indebtedness is not within the limitations of Section 11 of Article 10 of the Missouri Constitution limiting the general tax levy to 50c on the $100.00 valuation for cities of the fourth class.

2. That the total sum of a contract indebtedness payable in installments over a period of years is not an indebtedness within the limitation of Article 10, Section 12, of the Missouri Constitution.

In establishing the second point, the court quoted the following passage from Dillon on Municipal Corporations:

> "Under the constitutional provisions in Iowa, Illinois, Indiana and Pennsylvania, referred to, it is held that a corporation may make a contract (at least for necessaries) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished, and in such case, *the whole amount* which may ultimately become due *does not constitute a debt* within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition.' 1 Dillon's Municipal Corporations (4 Ed.), 1890, Sec. 136a."

In *Saleno* v. *The City of Neosho,* 127 Mo. 627, 30 S. W. 190 (1895), a contract by a city to pay a fixed price annually for 20 years for water was held not to create an indebtedness for the total sum of the 20 annual pay-

ments within the limitations of Section 12, Article 10, of the Missouri Constitution.

It may be argued by petitioner that in both of the cases *supra* the contracts with respect to water were contracts for services rather than for the acquisition of properties. We need not consider whether that would be a sound distinction for the reason that the contract which the City is authorized to make under Section 7276, Revised Statutes of Missouri 1929 (quoted in full in petitioner's brief, p. 13), empowers the City to "provide for the gathering, handling and disposition, either by itself or by contract with others for the gathering, handling and disposition of * * * refuse matter and municipal waste * * *; to acquire by purchase, construction, *lease*, gift or otherwise within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such * * * refuse matter and municipal waste; to acquire by *any of such means* a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities." (Italics ours.)

Thus within the exact terms of the statute, the City in the case at bar may lease rather than acquire ownership of the necessary sewage disposal facilities and in that manner bring itself within the exact facts which were involved in the Lamar case and the Neosho case, *supra*.

If we were advising the City of Harrisonville, we would advise the City that it could contract for the construction of necessary sewage disposal facilities to be paid for in ten annual installments, or it could contract by lease or otherwise for a service of sewage disposal to be provided by private enterprise.

The function of sewage disposal is frequently performed by private enterprise for compensation. One rea-

son, among others, for such enterprise is the well known fact that the residue from sewage disposal furnishes a by-product which has commercial value as fertilizer. The contract price, either for acquisition of the plant or to cover lease, rental or service over a period of years (in the latter case the statute does not limit the period to ten years) can be provided by the levy of a tax sufficient to pay the annual installment in each year; and for that purpose the City is not limited to a tax of 50c per $100.00 of valuation.

Let us summarize the powers of the City applicable to a reconstruction or repair of its sewage disposal plant:

(1) The City has by its own admission an available bonding power of $12,583.00, plus the increase in that figure due to retirement of bonds which may have occurred since June 17, 1930, the date of the trial and the date on which petitioner computes the above figure (R. 34, 102; petitioner's brief, p. 51).

(2) The City may submit to the voters a proposal to reconstruct or repair the sewage disposal plant and the voters may authorize whatever general tax is necessary for that purpose.

(3) The City may tax the cost of such improvement as special benefit assessments to the land in joint sewer districts created for that purpose.

(4) The City may contract for the improvement and pay the contract price from general revenues.

Finally there appears to be no reason why a combination of these methods may not be used.

Even if there were doubt concerning the City's powers, the officials should not at this stage resolve such doubt against the trial court's decree. They should first make the attempt to comply, and if blocked by some legal barrier

present that matter to the trial court where jurisdiction for such purposes was expressly reserved (R. 15, 16).

III.

In Any Event the Limitations Upon Financial Powers of the City Probably Do Not Apply to Matters Affecting Compliance with the Decree.

Limitations of the amount of municipal indebtedness apply only to debts created by voluntary act or contract, and not to obligations or liabilities imposed upon the corporation by law or against its will; 44 C. J. 1127.

It is well established in Missouri that a judgment against a municipality for a tort liability can not be defeated by pleading that the city has exhausted its debt making power.

In *Connor* v. *City of Nevada,* 188 Mo. 148, 86 S. W. 256 (1905), a judgment was rendered against the city for personal injuries occasioned by failure of the city to properly maintain a public street. The city pleaded that under the terms of Sections 11 and 12 of Article 10 of the Constitution of Missouri the debt making and taxing power of the city had been exhausted, and therefore the city could not be made liable for additional indebtedness. The court in rejecting the contention said:

> "The clause of the constitution in question deals with the subject of incurring indebtedness which arises *ex contractu* and which is very different in its nature from suffering liability for a tort. The language of Section 12 is that the city shall not be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. This

language shows that it is indebtedness incurred by assent, agreement or contract. The word debt has a well recognized meaning in law distinguished from liability for damages. After a claim for damages is reduced to a judgment it becomes, in a technical sense, a debt, but it is a debt imposed by law, not one assumed by contract."

In *State ex rel. Pyle, Administrator,* v. *City of University City et al.*, 320 Mo. 451, 8 S. W. (2) 73 (1928), the city sought to defeat a similar liability upon the same grounds. The contention was again rejected. The court said:

"Suits against municipalities, based on negligence, involve wrongful acts, whether of omission or commission. It was said in *Conner* v. *Nevada, supra*: 'A city cannot escape liability from an obligation arising *ex delicto* on the ground that its indebtedness has already reached the constitutional limit.' Again it was there said: 'Then when we turn again to the clause in our constitution on which appellant relies, we see that it refers only to the contracting of debts, and makes no reference to liability for torts; it leaves that matter as the common law left it.' To what then has the statute reference? It speaks of constitutional limits, but it is evident from the cases in this and other states that the constitution does not limit the rate of taxation where a tort is involved. Moreover, municipalities should not escape responsibility for their wrongful acts. Any other construction of the statute might permit them to so escape, and would, if collection of taxes for that purpose was thwarted. The constitutional limitation, as we have held, refers only to debts arising out of contractual relations, leaving the matter as it was at common law."

In *McCarthy* v. *City of Kelso,* 129 Wash. 121, 223 Pac. 151 (1924), it is held that a constitutional limitation

upon debt making power would not apply to excuse the city for failure to comply with an order of the state board of health requiring the construction of a water filtration plant, there being no other method whereby wholesome water could be supplied to the city. The court said:

> "Having held that the constitutional limitation does not apply to an indebtedness for the maintenance of a jail, a quarantine, a fire department, and impounding stock because such indebtedness is necessary for the preservation of property and the safety of the inhabitants, we see no reason why the constitutional limitation should prevent the city from incurring an indebtedness for the construction of a water filtration plant for the preservation of the health and lives of its citizens."

IV.

Comparative Injuries.

Petitioner contends that the alleged cost of improving the Harrisonville sewage plant should be offset against the amount of damages awarded respondent for loss of rents. This argument assumes that the only damage respondent has suffered is the difference between rent actually received for the premises and the theoretical rental value if the water in the stream were unpolluted. The decisions cited in this brief make frequent reference to the impossibility of determining accurately the injury suffered by a landowner from pollution in a stream and from noxious odors, gases and fumes. Damages caused by such nuisances include such intangible factors as discomfort, inconvenience and annoyance, *Baltimore and Potomac Railroad Company* v. *Fifth Baptist Church,* 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784 (1891). Indeed it is the very impossibility of adequately fixing compen-

sation in money for the injuries received from such sources which furnishes one ground for equitable jurisdiction.

The real measure of respondent's damage is the substantial destruction of a fine stock farm so long as the watercourse remains contaminated and polluted.

Furthermore, the doctrine of comparative injuries or balanced equities does not obtain in Missouri. In the case of *State ex rel.* v. *Powder Mfg. Co.*, 259 Mo. 254, 169 S. W. 267 (1914), a suit to abate a nuisance, the Missouri Supreme Court disposed of the doctrine in the following language:

> "Counsel for respondents say that we should consider the 'relative advantages and disadvantages to the parties concerned.' If it is meant by that assertion that substantial, certain and irreparable damages to the plaintiff which might be prevented by injunction are to be left without remedy because of the fact that greater damages and disadvantages would result to the defendant, a wrongdoer, by the issuing of the injunction, we are driven to emphatically say no. * * *
>
> 'But we have nothing to do with this question as to the comparative importance of the conflicting interests, or the inconvenience to the defendants by the stoppage of their works, if they infringe the material, substantial rights of others. It is the province and imperative duty of the court to ascertain and enforce the legal rights of the complainant, no matter what the consequence to defendants may be. This duty no court could evade if it would.' "

V.

The Injunction in Question Does not Compel Exercise of Legislative Power.

Petitioner makes the point that "the judiciary may not properly compel exercise of legislative power." Petitioner's argument consists of two false premises. The first erroneous premise is stated as follows: "It must be conceded, therefore, that the decision to build a secondary plant is the exercise of a legislative function" (Petitioner's Brief in support of petition, p. 46). It is far from clear why the above statement should be conceded when the authorities cited by petitioner establish the exact opposite of its statement.

The first authority cited by petitioner in support of its contention that the decision to build a sewage disposal plant is a legislative function, is 44 C. J. 1084, Sec. 4002 (p. 44 of Petitioner's Brief). The passage quoted by petitioner states that some courts have held that the construction of municipal drains and sewers is a corporate or municipal as distinguished from a governmental function, while other courts have held that it is a governmental or legislative function. But the only Missouri case cited by the authors is *Donahoe* v. *Kansas City*, 136 Mo. 657, 38 S. W. 571 (1897), and it is cited in support of the following:

> "Some authorities hold that the construction and maintenance of municipal drains and sewers is a corporate or municipal, as distinguished from a governmental function."

In the Donahoe case a workman brought action against the city to recover damages for injuries received while digging a trench for a sewer. The court held for the

plaintiff on the ground that the maintenance of sewers is a corporate rather than a governmental function. The court said:

> "But as soon as the corporation has determined to construct a public work, it enters upon an undertaking which, in all its details, should be subordinated to the rule requiring the use of care, for the work is then ministerial. (*Ib.*, Sec. 141, p. 267.)
>
> In *Johnston* v. *District of Columbia*, 118 U. S. 21, it is said: 'But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured.'
>
> 'The work of constructing gutters, drains, and sewers is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work.' 2 Dillon's Municipal Corporations (4 Ed.), Sec. 1049.
>
> The same rule was announced by this court in *Thurston* v. *St. Joseph*, 51 Mo. 510, and seems to be the general if not uniform doctrine upon this subject.
>
> The sewers of the city are its private property; the citizens are alone interested in them; the general public of the state at large has no interest in them, any more than they have in waterworks when owned by a city, by which its citizens are supplied with water, and in this very important particular differ from the streets of the city, which are for the benefit of the public generally."

It is interesting to note that although petitioner cites a part of Sec. 4002 of 44 C. J. 1084, it omits the part of the same section which reads:

> "Authority to construct and maintain drains and sewers gives no right to create a nuisance, or to construct drains or sewers or discharge sewage upon private lands without permission, or without acquiring the right to do so by lawful means and making due compensation to the landowner for the injuries sustained." (See cases cited in notes 37 and 38.)

The second false premise of petitioner's argument is that the court has ordered the City to erect a new disposal system. From time immemorial it has been the custom of courts of equity to enjoin a result, and to leave it up to the wrongdoing defendant to choose the method of stopping the enjoined result. This was the holding of the Salton Sea cases, 172 Fed. 792 (C. C. A. 9th, 1909), in which the court enjoined the flooding of lands in the United States caused by floodgates maintained by defendants in Mexico. It was conceded that the court had no authority to order the doing of acts in Mexico, but the court stated:

> "Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court."

Finally, respondent returns in all seriousness to the statement that the petitioner is not required by the decree to do anything except cease the discharge of putrescible sewage matter into the watercourse. Petitioner is offended by the suggestion that the people of Harrisonville may return to private disposal if they do not wish to maintain a general disposal plant complying with standard specifications. Petitioner says that this thought is "so abhorrent to one's sense of the requirements of social and community life that it scarcely requires further comment." We wonder if the thought of human excreta, visible in the stream, foul odors and noxious gases, constantly offensive, is at all abhorrent to the petitioner. There is great force in the statement of the trial judge (Albert L. Reeves) that the City of Harrisonville should not wish to dispose of its sewage in such a way as to do harm and injury to persons living in the environs. We submit that this court will take cognizance of the fact that the trial judge, in all probability, is quite familiar with local situations in Missouri, and that he knew full well that the City of Harrisonville was trying to do a thing which other similar cities have avoided doing. The City is trying to make respondent's pasture land a part of its sewage disposal plant.

VI.

The decisions of the courts below upon questions of fact and matters of discretion will not be disturbed on certiorari.

The courts below have found the existence of the nuisance, and that by means, reasonably available, it may be abated. Such findings of fact will not ordinarily be disturbed on review in this court. *Bochmer* v. *Pennsylvania R. Co.*, (N. Y. 1920) 40 S. Ct. 409, 252 U. S. 496,

64 L. Ed. 680; *Fireball Gas Tank & Illuminating Co.*, (Mo. 1915) 36 S. Ct. 86, 239 U. S. 156, 60 L. Ed. 191; *The Linseed King*, (N. Y. 1932) 52 S. Ct. 450, 285 U. S. 502, 76 L. Ed. .....

Likewise the determination of the courts below upon any pertinent question of comparative injury will not ordinarily be disturbed by this court. Such determination is a matter of discretion. *Smith* v. *Staso Milling Co.*, 18 F. (2d) 736.

Conclusion.

Petitioner admits the existence of the nuisance. The admission involves all that the record shows as to a condition of gross pollution in the watercourse on respondent's land. Petitioner admits that reasonable means in general use are available for abating the nuisance. Petitioner's chief defense is that the City has no financial power to raise the funds involved in remodeling the sewage system. The ground for review upon certiorari under this head is an alleged conflict between the decision of the United States District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals, and a decision of the Supreme Court of Missouri (*Union Trust Co.* v. *Pagenstecher*, 221 Mo. 121, 119 S. W. 1103 [1909]).

We have shown that that case did not hold the statute authorizing a Special Public Sewer Tax unconstitutional, but simply held a *tax* levied under that statute in that case invalid because the matter had not been submitted to a vote, as required by Section 11, Article 10 of the Constitution of Missouri. The trial court and the appellate court did not even mention the Special Public Sewer Tax in rendering the decision, but if that method of raising

revenue had been expressly relied upon there would have been no conflict. Furthermore, we have shown three other financial methods by which funds could be raised for sewage disposal purposes. Therefore that ground for certiorari must fall.

The petitioner states that the question of what constitutes a permanent as distinguished from a temporary nuisance is of such great importance that this court should pass upon it. We have shown that the real question is whether a city may maintain a method of sewage disposal, however inadequate, and however injurious to adjoining property owners, and escape all supervision by courts of equity on the theory that the injured property owner may have an action at law for damages. We have shown that in the case at bar such a cause of action is now barred by the five-year statute of limitations in Missouri. However, this unfortunate result to the respondent in this case would probably not be a controlling factor. If the question proposed by petitioner is one of great importance, then the factor which we believe will control this court is the following:

If an equity court has no supervisory power, then any municipality may create any kind of unnecessary nuisance in the way of sewage disposal, taking the chance that a jury in a suit for damages would be lenient so that the cost of the inadequate and improper disposal method plus the damages to be paid for projecting raw sewage onto private property, would amount in the aggregate to less than a sufficient and proper disposal plant would cost. We do not believe that this court will announce a rule which will make that the controlling factor in determing what type of sewage disposal plants municipalities shall construct. If the question is important enough to be settled by this court, then the equitable jurisdiction which

the trial court and the appellate court have exercised should be confirmed. The results of such a rule will be salutary and will look solely toward the construction of sewage disposal facilities which will not unnecessarily injure private property owners and will tend to clean, wholesome, sanitary conditions in the environs of municipalities.

Petitioner urges that the decree encroaches upon the legislative function. We have shown that the municipal function of sewage disposal is not legislative. But even if it were, it cannot be exercised so as to create a nuisance. A judicial decree finding the existence of such a nuisance and enjoining it does not encroach upon the legislative function.

Petitioner urges that the courts below should have balanced inconvenience to the municipality against the damage to the respondent. We have shown that the Missouri courts do not subscribe to such a doctrine. Even if the doctrine obtained in Missouri, review of such a matter of discretion is not the purpose of a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

"Sec. 860. *Period of Limitation Prescribed.*—Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: * * *

Sec. 862. *What Within Five Years.*—Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in Section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." (Revised Statutes of Missouri, 1929.)

APPENDIX B.

"Sec. 7037. Joint District Sewers. Whenever the city may deem it necessary that a sewer should be constructed or reconstructed in any part of the city containing two or more sewer districts, it may, by ordinance, unite such sewer districts into a joint sewer district and cause a sewer to be constructed therein in like manner in all respects as is provided in Section 7032, in case of district sewers, and should the board of aldermen, by ordinance, unite two or more sewer districts into a joint sewer district for the purpose of constructing a joint district sewer therein, the action of the board of aldermen shall be conclusive for all purposes, and no special tax-bill shall be held invalid or be affected on account of the included drainage area thereof, or the size, character or purpose of such sewer: Provided, however, that no sewer district shall be included in such joint district which is not contained in the natural drainage area of the valley or watercourse in which joint district sewer is proposed to be constructed." (Revised Statutes of Missouri, 1929.)

APPENDIX C.

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, * * * *and provided further,* that any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same: * * *."
(Sec. 12, Art. 10, Missouri Constitution.)